Filed 6/28/19 P. v. Thompson CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD JAMES THOMPSON,

Defendant and Appellant.

F077598

(Super. Ct. Nos. F17900396, M17911630)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. James Petrucelli, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Smith, J. and DeSantos, J.

Defendant Richard James Thompson was convicted of offenses arising from two incidents of driving under the influence. On appeal, he contends Penal Code section 1001.36[1] applies to him retroactively and we should remand for the trial court to consider whether he should be granted pretrial mental health diversion. We affirm.

PROCEDURAL BACKGROUND[2]

Case No. F17900396 involved events occurring on January 18, 2017. As the case proceeded, the trial court suspended proceedings because of a doubt as to defendant's competence to stand trial (§ 1368). A jury thereafter found defendant competent to stand trial.

On December 22, 2017, a jury convicted defendant of driving under the influence while possessing a blood alcohol concentration of 0.08 percent or more and causing bodily injury (Veh. Code, § 23153, subd. (b); count 1) and driving under the influence and causing bodily injury (Veh. Code, § 23153, subd. (a); count 2). As to both counts, the jury found true allegations that defendant caused injury to more than one victim (Veh. Code, § 23558) and possessed a blood alcohol concentration of 0.15 percent or more (Veh. Code, § 23578). Defendant admitted having suffered two prior felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)).

Case No. M17911630 involved events occurring on January 10, 2017. On April 26, 2018, defendant pled no contest to driving under the influence while possessing 0.08 percent or more of blood alcohol (Veh. Code, § 23152, subd. (b); count 1) and admitted having suffered two prior felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)).

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1 All statutory references are to the Penal Code unless otherwise noted.

2 The facts are not relevant to the issue raised on appeal.

On May 31, 2018, the trial court sentenced defendant in both cases to a total of six years four months. In case No. F17900396, the court imposed the midterm of four years on count 1 (two years, doubled pursuant to the Three Strikes law), plus a one-year enhancement pursuant to Vehicle Code sections 23558 and 23578. On count 2, the court imposed four years (two years, doubled), then stayed the term pursuant to section 654. In case No. M17911630, the court imposed one year four months (one-third the two-year midterm, doubled), to be served consecutively to the term in case No. F17900396.

On June 4 and 7, 2018, defendant filed a notice of appeal in both cases.

DISCUSSION

Defendant contends his case should be remanded to the trial court with directions to determine whether he should be granted pretrial diversion pursuant to the newly enacted section 1001.36, which he claims applies to him retroactively. The People maintain that section 1001.36 does not apply retroactively to cases that are already adjudicated. We agree with the People.

"Section 1001.36 created a diversion program for defendants who suffer from medically recognized mental disorders, 'including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder ….' (§ 1001.36, subd. (b)(1)(A).) Enacted as part of Assembly Bill No. 1810 (2017–2018 Reg. Sess.) …, which was a budget trailer bill, the law took effect on June 27, 2018. (Stats. 2018, ch. 34, §§ 24, 37). Three months later, the statute was amended to prohibit its use in cases involving murder, voluntary manslaughter, rape and other sex crimes, the use of a weapon of mass destruction, and any offense 'for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314[, i.e., indecent exposure].' (§ 1001.36, subd. (b)(2)(B); see *id.*, subd. (b)(2)(A)–(H);

Stats. 2018, ch. 1005, § 1.)" (*People v. Craine* (May 23, 2019, F074622) ___ Cal.App.5th ___, ___ [pp. 15–16] [2019 WL 2224863] (*Craine*).)

In *Craine*, we addressed the retroactivity issue and concluded section 1001.36 does not apply retroactively to cases like the present one:

> "Section 1001.36 was enacted during the pendency of this appeal. It authorizes, in lieu of criminal prosecution, the placement of certain alleged offenders into mental health treatment programs. The statute expressly contemplates a 'pretrial diversion' procedure (*id*., subd. (a)), but Craine contends he is still a 'potential candidate for diversion,' assuming the law applies retroactively. The issue of retroactivity is currently under review by the California Supreme Court. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220.)
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> "We conclude the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants, like Craine, who have already been found guilty of the crimes for which they were charged. The statute potentially mitigates punishment for a specific class of persons, i.e., mentally disordered alleged offenders whose charges have not yet been adjudicated (*id*., subds. (a), (c)), and Craine is not a member of the class. The primary legislative goal of diverting mentally ill defendants from the criminal justice system through preadjudicative intervention programs cannot be achieved once the defendant has been tried, adjudged guilty, and sentenced.
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> "Secondary goals of judicial economy and fiscal savings would actually be thwarted by attempting to apply the statute to defendants who have begun serving their sentences. In many instances, such individuals will have been released from confinement by the time their cases are remanded to determine their fitness for any supposed diversionary relief. Furthermore, although section 1001.36 provides for the dismissal of charges and expungement of a defendant's record of arrest, there is no mention of similar relief for a record of conviction. [T]here are distinctions between a preconviction and postconviction dismissal of charges, and the Legislature's failure to address those differences also weighs against any inference of retroactive intent." (*Craine, supra*, ___ Cal.App.5th at p. ___ [pp. 14–15].)

Here, defendant was convicted and sentenced in both cases before section 1001.36 became effective. Accordingly, the new law does not apply to him retroactively.

DISPOSITION

The judgment is affirmed.